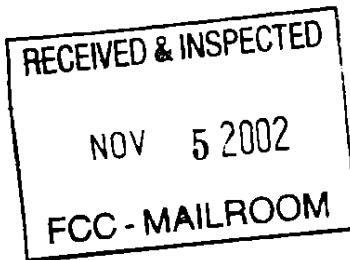


KATZ & KORIN

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DOCKET FILE COPY ORIGINAL



October 30, 2002

VIA OVERNIGHT MAIL

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Secretary
FEDERAL COMMUNICATIONS COMMISSION
Room TW-204B
445 - 12th Street SW
Washington, D.C. 20554

RE: *Comments on Notice of Proposed Rulemaking*
Docket Nos. 02-278 and 92-90

RONALD M. KATZ
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THOMAS M. ATHERTON
WILLIAM C. POTTER, II

Dear Secretary:

I have enclosed the original and nine (9) copies of the *Comments of Robert J. Schuckit on Notice of Proposed Rulemaking of Federal Communications Commission* for distribution and consideration by the Commissioners. I have also enclosed an extra copy of the first page of my filing, and a self-addressed, stamped envelope for return of a stamped copy acknowledging the FCC's receipt of my package.

Thank you in advance for your prompt attention to this matter. Should you have any questions, please do not hesitate to call.

Very truly yours,

KATZ & KORIN, P.C.

Robert J. Schuckit

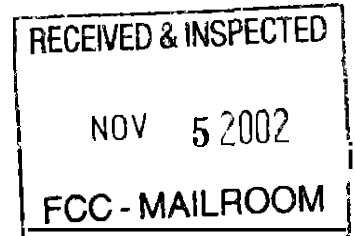
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Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

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CG Docket No. 02-278
CG Docket No. 92-90

**COMMENTS OF ROBERT J. SCWCKIT ON NOTICE OF PROPOSED
RULEMAKING OF FEDERAL COMMUNICATIONS COMMISSION**

The following are comments of attorney Robert J. Schuckit in response to the FCC's *Notice of Proposed Rulemaking*, Section II(B)(1)(g)(i), Paragraph 38, entitled *Unsolicited Facsimile Advertisements, Prior Express Invitation or Permission*. In this Section, the FCC "seek[s] comment on the need to clarify what constitutes prior express invitation or permission for purposes of sending an unsolicited fax."

Keeping Records of Permission: Regardless of what constitutes permission or invitation to receive a fax advertisement, the FCC should implement a rule requiring fax advertisers to keep detailed records of how and when they received permission. Such a rule would take the guesswork out of determining whether a recipient had given permission to receive a fax should the issue arise.

When Congress passed the TCPA, it specifically placed on advertisers the burden of obtaining and maintaining records of permission. *See*, House Report No. 102-317 ("House Report"); Senate Report 102-178 ("Senate Report"). The House Report provides, in part, as follows:

[E]nterprises relying on the [permission] exception should establish specific procedures for obtaining prior permission and maintaining appropriate documentation with respect to such permission."

(emphasis added).¹ Similarly, the Senate Report provides, in part:

¹ The above-quoted excerpt appears in a section of the House Report dealing with telephone solicitations.

While telemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive [advertisement] fax messages, such a responsibility, is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine.

While it is clear that Congress intended that telemarketers making telephone solicitations be required to maintain records of permission, and that fax advertisers be responsible for determining whether a potential recipient has given consent, it is not entirely clear whether fax advertisers must maintain records of this consent.

The FCC should clarify this confusion by requiring all telemarketers, regardless of the medium(s) they use, to obtain and maintain records of permission. In the absence of such records, a telemarketer should not be allowed to rely on the permission exception. The FCC's rule should specifically mandate that telemarketers keep information such as: the date permission was obtained, the identity of the person who gave permission, how the permission was obtained, and exactly what permission was given.

Distribution and Publication of Fax Numbers: The FCC's 1995 determination in its *TCPA Reconsideration Order* that mere distribution or publication of a fax number was not tantamount to invitation or permission should not be rescinded or modified. If distribution or publication of one's fax numbers were found to constitute permission or invitation, the TCPA's unsolicited fax advertisement provision would be rendered essentially meaningless. Advertisers could quickly assemble lists of fax numbers from publications or numerous other sources and claim unbridled permission to send advertisement faxes. A rule that equated publication or distribution with permission would potentially subject businesses that published or distributed their fax numbers to a barrage of fax advertisements, with no means of recourse.

My law firm's fax number is published in various legal directories, on my firm's web page, and on other web sites such as Martindale Hubbell; my firm's fax number, which is printed on our letterhead and business cards, is distributed every time someone in my office sends a letter or distributes a business card. If such publication and distribution constituted permission or invitation to receive faxes, there would be nothing to prevent fax advertisers from faxing us advertisements in which we are not interested.

Membership in Trade Association or Similar Group: Membership in a trade association or similar group should not be seen as consent to receive faxes for products or services related to the type of association. For example, membership in a bar association should not be construed as consent to receive faxes advertising products/services related to the legal profession. While it seems logical that some association members might be interested in certain related products/services, it would be impossible to determine which were sufficiently related. Would an advertisement for filing cabinets or office supplies be acceptable? What about computer

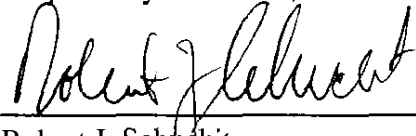
equipment? Certainly most lawyers use these products, but would they be considered products related to the legal profession? The myriad of possibilities for confusion makes permission based on trade association membership impossible. Thus, membership in a trade association should not be found to constitute consent to receive advertisement faxes.

Treatment of Consent on a Case-By-Case Basis: The FCC's current rules, in which the consent issue is treated on a case-by-case basis, leave a gray area in what constitutes consent. Obviously, not every possible form of consent can be anticipated. However, if the FCC were to offer concrete rules for various potential forms of permission, it would clarify much of **this gray** area.

10/30/07

Date

Respectfully submitted,



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